FILE COPY

No. ——, Original

In the Supreme Court of the United States

October Term, 1935

THE STATE OF OHIO, COMPLAINANT

v.

GUY T. HELVERING, AS AN INDIVIDUAL AND AS COMMISSIONER OF INTERNAL REVENUE, AND THOMAS J. CONNOR, CARL E. MOORE, HARRY F. HUBER, AND CHARLES H. GRAVER, AS INDIVIDUALS AND AS UNITED STATES COLLECTORS OF INTERNAL REVENUE IN THE STATE OF OHIO

ON RULE TO SHOW CAUSE WHY LEAVE TO FILE BILL OF COMPLAINT SHOULD NOT BE GRANTED

RESPONSE TO THE RULE TO SHOW CAUSE, AND BRIEF IN SUPPORT THEREOF

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. —, Original

THE STATE OF OHIO, COMPLAINANT

v.

GUY T. HELVERING, AS AN INDIVIDUAL AND AS COMMISSIONER of Internal Revenue, and Thomas J. Connor, Carl E. Moore, Harry F. Busey, and Charles H. Graves, as Individuals and as United States Collectors of Internal Revenue in the State of Ohio

ON RULE TO SHOW CAUSE WHY LEAVE TO FILE BILL OF COMPLAINT SHOULD NOT BE GRANTED

RESPONSE TO THE RULE TO SHOW CAUSE

Now come the defendants above named, by the Solicitor General, and for their response to the rule to show cause issued by this Court on April 9, 1934, say that the motion for leave to file the bill should not be granted, for the following reasons:

1. The cause is not within the original jurisdiction of this Court, because four of the defendants are citizens of the complainant State.

2. The prosecution of the suit is prohibited by Section 3224, Revised Statutes.

3. Complainant has a plain, adequate, and complete remedy at law.

4. The United States is the real party in interest, which may not be sued without its consent.

5. The merits are settled against the complainant's contention by *South Carolina* v. *United States,* 199 U.S. 437.

And in support of this response, the defendants ask leave to file the brief hereto attached.

Wherefore the defendants pray that the motion for leave to file the proposed bill be denied, and the rule discharged.

J. CRAWFORD BIGGS,
Solicitor General.

APRIL 1934.

BRIEF ON BEHALF OF THE DEFENDANTS, IN SUPPORT OF THEIR RESPONSE TO THE RULE

JURISDICTION

The motion was submitted April 2, 1934. The rule to show cause issued April 9, returnable on April 30.

Jurisdiction is asserted under the Constitution of the United States, Article III, Section 2, Clause 2. The existence of jurisdiction is disputed.

QUESTIONS PRESENTED

1. Whether this Court has original jurisdiction of a suit by a State, against a citizen of another State and four citizens of the complainant State, to enjoin the enforcement, against liquor stores operated by the State, of the Federal taxes on retail and wholesale liquor dealers.

2. Whether such a suit is prohibited by Section 3224, Revised Statutes.

3. Whether this suit may be maintained where the complainant has a plain, adequate, and complete remedy at law.

4. Whether the United States is the real party in interest.

5. Whether the bill presents a substantial question on the merits.

STATUTES INVOLVED

These are set forth in the Appendix, *infra,* pp. 17–18.

STATEMENT

This is a motion by the State of Ohio for leave to file an original bill.

The defendants are the Commissioner of Internal Revenue, who is stated to be a citizen of Kansas, and the Collectors of Internal Revenue for the four Ohio districts, who are stated to be "residents" of Ohio (Bill, p. 10).

The bill sets out that by an Act of the General Assembly passed December 22, 1933, Ohio concluded to create a state monopoly of the distribution and sale of spirituous liquor, and is about to open 187 state liquor stores (pp. 10–11). The defendant Busey (one of the Collectors) has notified the Ohio authorities that each of these stores is subject to the special tax on retail liquor dealers imposed by Section 3244, Revised Statutes (U.S.C., Title 26, Sec. 205, *infra,* p. 17), and also that the State is subject to the tax on wholesale dealers imposed by the same section; and the defendants have threatened and intend to levy and collect these taxes (pp. 11–12). Complainant asserts that it is not subject to these taxes by the terms of the Act, and cannot constitutionally be made subject to them (p. 12). Certain considerations to justify relief in equity are suggested (pp. 12–13) and the prayer is that the Court enjoin the enforcement of the taxes as against complainant and its agencies (pp. 14–15).

SUMMARY OF ARGUMENT

1. The cause is not within the original jurisdiction of this Court, because four of the defendants are citizens of the complainant State.

2. Injunction will not lie to restrain the collection of a Federal tax. Section 3224, Revised Statutes, has been uniformly applied even where it appears that the tax is illegal or unconstitutional. To make this section inapplicable there must exist special and extraordinary circumstances, which do not exist in this case.

3. The Government has provided a complete system of corrective justice in the administration of its revenue laws, which is founded upon the idea of appeals within the executive departments, where if the party aggrieved cannot obtain satisfaction, there are provisions for recovering the tax after it is paid, by suit against the collecting officer, or against the United States. Complainant has an adequate remedy at law by paying the tax and suing for its recovery.

4. The tax which is challenged is one provided for the operation of the general Government. The defendants have no personal interest in the collection of the tax. The acts complained of are the acts of the defendants in their official capacities, done under color of their offices in the performance of an official duty. Hence the United States is the real party in interest, and it cannot be sued without its consent.

5. The merits have already been decided against complainant's contention.

ARGUMENT

I

THIS CAUSE IS NOT WITHIN THE ORIGINAL JURISDICTION OF THIS COURT

The suit is by the State of Ohio against five individuals, one of whom is stated to be a citizen of Kansas, and the other four to be "residents" of Ohio (Bill, p. 10). Since these four are Collectors of Internal Revenue (p. 10) they may be assumed to be citizens of the United States, and are therefore also citizens of the State wherein they reside (Fourteenth Amendment, Sec. 1), that is, of Ohio.

The original jurisdiction of this Court depends wholly on the character of the parties; in cases where the existence of judicial power depends on the fact that the Constitution or laws of the United States are involved, the jurisdiction is appellate only. *Cohens* v. *Virginia,* 6 Wheat. 264, 392–399. It is accordingly well settled that this Court has no original jurisdiction of a suit by a State against its own citizens, nor of one to which such citizens are necessary parties defendant; and this is true although the case involves a constitutional question. *Pennsylvania* v. *Quicksilver Company,* 10 Wall. 553; *California* v. *Southern Pacific Company,* 157 U.S. 229, 257–262; *Minnesota* v. *Northern Securities Company,* 184 U.S. 199, 235, 237–

238, 247; *New Mexico* v. *Lane,* 243 U.S. 52, 58; *Texas* v. *Interstate Commerce Commission,* 258 U.S. 158, 163–164.

The question, therefore, is whether the four Collectors are necessary parties defendant. The bill is to prevent the application of the Federal taxes on retail and wholesale liquor dealers to the complainant's stores, and specifically to enjoin the collection of such taxes, the requiring of returns, the levy and distraint of property, and the institution of suits for penalties (Bill, pp. 14–15). All the things to be enjoined are within the express statutory duty of Collectors. (Collection of Taxes, R.S., Secs. 3183 and 3184 as amended, U.S.C., Title 26, Secs. 103, 104, 112; requiring returns, R.S., Secs. 3173, 3175, 3176 as amended, U.S.C., Title 26, Secs. 93, 94, 96, 97; distraint, etc., R.S., Secs. 3187–3202 as amended, U.S.C., Title 26, Secs. 116–131; collecting penalties, R.S., Sec. 3213 as amended, U.S.C., Title 26, Sec. 142; general duty to enforce the revenue laws, R.S. 3163 as amended, U.S.C., Title 26, Sec. 34.) The Collectors are not mere subordinates of the Commissioner of Internal Revenue (like the disbursing officer in *Miguel* v. *McCarl,* No. 435, present term), but are important officers of the Government, appointed by the President with the advice and consent of the Senate (R.S., Sec. 3142, U.S.C., Title 26, Sec. 14), and charged directly by statute to do everything which this bill endeavors to enjoin. They are, therefore, clearly necessary

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parties defendant, and the case could not proceed without them.

This being so, and they being all citizens of the complainant State, it seems clear that original jurisdiction in this Court does not exist.

In *California* v. *Southern Pacific Co.*, 157 U.S. 229, *supra,* the City of Oakland and the Oakland Water Front Company were not named as defendants. This Court held that they were necessary parties. Considering the effect of this upon the jurisdiction the Court stated that the question was (pp. 261–262)—

> whether, where the Constitution provides that this court shall have original jurisdiction in cases in which the State is plaintiff and citizens of another State defendants, that jurisdiction can be held to embrace a suit between a State and citizens of another State and of the same State. We are of opinion that our original jurisdiction cannot be thus extended, and that the bill must be dismissed for want of parties who should be joined, but cannot be without ousting the jurisdiction.

The same result was reached in *Minnesota* v. *Northern Securities Co., supra; New Mexico* v. *Lane, supra;* and *Texas* v. *Interstate Commerce Commission, supra.* In *California* v. *Southern Pacific Co., supra,* and *Texas* v. *Interstate Commerce Commission, supra,* constitutional questions were presented. The present case is stronger than those

cited, in that the four citizen-defendants, whose presence ousts the jurisdiction, are named as defendants in the bill. Their duties show that they are necessary parties, they cannot be dispensed with, and their presence ousts the jurisdiction.

II

THIS SUIT IS PROHIBITED BY SECTION 3224, REVISED STATUTES

The provisions of the statute challenged by the complainant impose taxes. It follows, as repeatedly decided by this Court, that the enforcement of that statute could not be enjoined even upon the ground that it was unconstitutional. *Graham* v. *du Pont,* 262 U.S. 234; *Bailey* v. *George,* 259 U.S. 16. The Court could not assume jurisdiction unless there were further shown "some extraordinary and entirely exceptional circumstance" which rendered the provisions of the Revised Statutes inapplicable. *Dodge* v. *Osborn,* 240 U.S. 118, 122. Such circumstances are clearly described in the language which this Court used in *Fenner* v. *Boykin,* 271 U.S. 240, 243, concerning the enjoining of state officers from enforcing criminal laws, where it was said that that may not be done except under extraordinary circumstances "where the danger of irreparable loss is both great and immediate."

Such extraordinary and exceptional circumstances do not exist in the present case. There is no danger of any loss to the State itself. Nor does

the tax fall upon any individuals in any such manner as did the alleged tax which was held unconstitutional in *Hill* v. *Wallace,* 259 U.S. 44, 62. Neither is the tax one which has previously been adjudicated to be upon a product not taxable, or one in which the taxpayer had been misled into carrying on business through previous rulings of the taxing officials that the product sought to be taxed was nontaxable, as was found to be the case in *Miller* v. *Nut Margarine Co.,* 284 U.S. 498, where such circumstances were held sufficient to justify an injunction.

The bill which the State seeks to file shows nothing which takes the case out of the general rule that *even* if the tax were unconstitutional, its assessment and collection could not be enjoined.

If there is any exception to the application of Section 3224 of the Revised Statutes, this case is not within it. The effect of this section, as construed and applied by this Court, may be summed up as follows: If the assessment is of a tax for revenue purposes, made and attempted to be enforced by the proper revenue officers of the United States under color of their offices, its collection cannot be stayed by injunction. *Cheatham* v. *United States,* 92 U.S. 85; *State Railroad Tax Cases,* 92 U.S. 575; *Snyder* v. *Marks,* 109 U.S. 189; *Pacific Whaling Co.* v. *United States,* 187 U.S. 447; *Corbus* v. *Gold Mining Co.,* 187 U.S. 455; *Dodge* v. *Osborn,* 240 U.S. 118;

Dodge v. *Brady*, 240 U.S. 122; *Bailey* v. *George*, *supra*; *Graham* v. *du Pont*, *supra*; *Phillips* v. *Commissioner*, 283 U.S. 589, 595–596.

All of the results predicted by complainant in its proposed bill can be avoided by the payment of the tax sought to be enjoined. This tax is not one against the State. It is not one which attaches to the State in its governmental capacity, but is a business expense incurred in the operation of a business in which the State is engaging in its private corporate capacity. The State of Ohio in the sale of alcoholic beverages under its Liquor Control Act stands on the same footing upon which every other dealer stands in States where alcoholic liquors are sold for beverage purposes by individuals and private corporations, who add the internal revenue tax to the price of the liquor which is sold, and the purchaser pays it.

Section 3224, Revised Statutes, goes to the general jurisdiction of all courts. Its application here is an inhibition against the filing of the bill.

III

COMPLAINANT'S REMEDY AT LAW IS PLAIN, ADEQUATE, AND COMPLETE

The tax complained of is that imposed by R.S., Section 3244, *infra*, p. 17. Complainant's tax upon its retail stores is $4,675 (187 stores at $25). The number of wholesale establishments is not stated in the bill, but can hardly be large, and the

tax on each is $100. The tax is annual. Complainant is therefore in position to avoid, by a single money payment of moderate amount, all the embarrassments to itself and its officers suggested in the bill; and if the tax does not lawfully attach, is in position to recover it, with interest, against a perfectly solvent defendant, in one suit, which will also settle the question for the future. This ordinary remedy is both adequate and simple. No special and exceptional circumstances are suggested adequate to justify the extraordinary remedy of enjoining the Collectors. Even in the enforcement of the collection of state taxes, where Section 3224, Revised Statutes, is unavailing, this Court has denied injunctive relief where an adequate remedy at law exists. *Matthews* v. *Rodgers,* 284 U.S. 521; *Stratton* v. *St. L. S. W. Ry. Co.,* 284 U.S. 530.

In *State Railroad Tax Cases,* 92 U.S. 575, *supra,* this Court said (p. 613):

> The government of the United States has provided, both in the customs and in the internal revenue, a complete system of corrective justice in regard to all taxes imposed by the general government, which in both branches is founded upon the idea of appeals within the executive departments. If the party aggrieved does not obtain satisfaction in this mode, there are provisions for recovering the tax after it has been paid, by suit against the collecting officer. But there

> is no place in this system for an application to a court of justice until after the money is paid.

The validity of a tax cannot be challenged until it has first been paid. *Corbus* v. *Gold Mining Co., supra; Dodge* v. *Osborn, supra; Graham* v. *du Pont, supra.*

Governments have found it necessary to adopt stringent methods for the collection of taxes and to be rigid in the enforcement of them. The revenue measures of this country constitute a system which provides for their enforcement by officers commissioned for that purpose. This system provides safeguards of its own against mistake, injustice, or oppression, in the administration of such revenue laws. Appeals are allowed to specified tribunals as the lawmakers deem expedient. Remedies are also provided for recovering back taxes when illegally exacted. These factors lead the courts to deny injunctive relief where a taxpayer has failed to exhaust his legal remedies. This principle is announced in Section 723, Revised Statutes (U.S.C., Title 28, Sec. 384).

IV

THE UNITED STATES IS AN INDISPENSABLE PARTY

The United States is the real party in interest in this cause and is an indispensable party. *Morrison* v. *Work,* 266 U.S. 481; *Lambert Co.* v. *Balt. & Ohio R.R. Co.,* 258 U.S. 377, 382; *Texas* v. *Interstate*

Com. Comm., 258 U.S. 158, 164; *North Dakota* v. *Chicago & N. W. Ry. Co.*, 257 U.S. 485; *Wells* v. *Roper*, 246 U.S. 335; *New Mexico* v. *Lane*, 243 U.S. 52; *Louisiana* v. *McAdoo*, 234 U.S. 627; *Louisiana* v. *Garfield*, 211 U.S. 70, 78; *Oregon* v. *Hitchcock*, 202 U.S. 60, 68, 69; *Minnesota* v. *Hitchcock*, 185 U.S. 373, 387; *Kansas* v. *Colorado*, 185 U.S. 125. See *Arizona* v. *California*, 283 U.S. 423; *Massachusetts* v. *Mellon*, 262 U.S. 447. The United States may not be sued even by a State without its consent. *Kansas* v. *United States*, 204 U.S. 331, 342. Especially should this principle be invoked where, as here, no tax has as yet been paid. The title to the proceeds of the tax vests in the United States, which is interested in enforcing its payment. The question of whether the United States is a party to a controversy is not determined by the merely nominal party on the record, but by the question of the effect of the judgment or decree which can be entered. *Oregon* v. *Hitchcock, supra; Minnesota* v. *Hitchcock, supra.* The officers who are the nominal defendants have no pecuniary interest in the tax.

It has been held that suits against a Collector of Internal Revenue for the recovery of taxes erroneously paid are personal. *United States* v. *Sherman*, 98 U.S. 565; *Sage* v. *United States*, 250 U.S. 33. Yet where a question has been adjudged as between a taxpayer and the Government, or its official agent, the Commissioner of Internal Rev-

enue, the Collector, being an official inferior in authority, and acting under them, is in such privity with them that he is estopped by the judgment. *Tait* v. *Western Md. Ry. Co.*, 289 U.S. 620, 627. However, it seems that this Court did indicate in *Moore Ice Cream Co.* v. *Rose*, 289 U.S. 373, 380, 383, that in such suits the United States is the real party in interest, where it was held that the presence of the Collector as a defendant "is merely a remedial expedient for bringing the Government into court." It is urged that this principle is applicable where the suit is one to enjoin the collection of a tax.

In this connection it is urged that to come within the original jurisdiction of this Court, a suit by a State must be for redress of a wrong, or enforcement of a right, susceptible of judicial redress or enforcement. *Florida* v. *Mellon*, 273 U.S. 12, 16. Other States, in situations similar to that of complainant, have heretofore proceeded in the ordinary way without loss of sovereignty. *South Carolina* v. *United States*, 199 U.S. 437; *Board of Trustees* v. *United States*, 289 U.S. 48.

III

THE MERITS

We do not now discuss the merits in detail. This case, however, seems indistinguishable from *South Carolina* v. *United States*, 199 U.S. 437.

CONCLUSION

It is therefore respectfully submitted that the motion for leave to file the bill should be denied and the rule discharged.

J. CRAWFORD BIGGS,
Solicitor General.
FRANK J. WIDEMAN,
Assistant Attorney General.
JAMES W. MORRIS,
M. H. EUSTACE,
CHARLES BUNN,
Special Assistants to the Attorney General.

APRIL 1934.

APPENDIX

Statutes Involved

Revised Statutes Sec. 3244 as amended (U.S.C., Title 26, Sec. 205):

* * * * *

> That retail dealers in liquors shall pay twenty-five dollars. Every person who sells, or offers for sale, foreign or domestic distilled spirits, wines, or malt liquors, otherwise than as hereinafter provided, in less quantities than five wine gallons at the same time, shall be regarded as a retail dealer in liquors. Wholesale liquor-dealers shall each pay one hundred dollars. Every person who sells, or offers for sale, foreign or domestic distilled spirits, wines, or malt liquors, otherwise than as hereinafter provided, in quantities of not less than five wine gallons at the same time, shall be regarded as a wholesale liquor-dealer. * * *

* * * * *

The other statutes cited in the bill (p. 12) do not impose additional taxes, but deal with the following:

Revised Statutes:

Sec. 3233 (U.S.C., Title 26, Sec. 182): duty to register.

Sec. 3235 (U.S.C., Title 26, Sec. 184): several locations, separate tax for each.

Sec. 3281 (U.S.C., Title 26, Sec. 193): penalty for nonpayment.